(15)

No. 05-184

In The

Supreme Court of the United States

SALIM AHMED HAMDAN,

Petitioner,

v.

DONALD H. RUMSFELD, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF *AMICUS CURIAE* OF LOUIS FISHER IN SUPPORT OF PETITIONER [COMMISSIONS - HISTORY]

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. The Separation Of Powers Has Historically Limited The Executive's Authority To Establish Military Commissions	3
II. The Current Military Commissions Are completely Without Precedent	11
A. Military Commissions Have Traditionally Been Confined to a Zone of Combat Operations or Occupied Territory	12
B. The Procedures Used in Military Commissions Have Historically Conformed to Those Used in Courts-Martial	18
C. Military Commissions Have Never Before Singled Out a Broad Class of Non-Citizens	25
CONCLUSION	27

TABLE OF AUTHORITIES

Page

CASES

Clinton v. City of New York, 524 U.S. 417 (1998) 26

Duncan v. Kahanamoku, 327 U.S. 304 (1946) 17

Ex parte Mason, 256 F. 384 (C.C.N.D.N.Y. 1882) 21

Ex parte Milligan, 71 U.S. 2 (1866) 8

Ex parte Quirin, 317 U.S. 1 (1942) ..... *passim*

Ex parte Quirin, 47 F. Supp. 431 (D.D.C. 1942) 15

Ex Parte Quirin, 63 S. Ct. 1 (1942) 16

Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004) 18, 23

Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005).. 2, 10, 13

Hamdi v. Rumsfeld, 542 U.S. 507, 124 S. Ct. 2633 (2004) 9, 17, 25

Haupt v. United States, 330 U.S. 631 (1947) 17

Johnson v. Eisentrager, 339 U.S. 763 (1950) 13

Kinsella v. United States ex rel. Singleton, 361 U.S. 234 (1960) 14

Madsen v. Kinsella, 343 U.S. 341 (1952) 14

McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960) 14

North Jersey Media Group v. Ashcroft, 308 F.3d 198 (3d Cir. 2002) 26

Rasul v. Bush, 542 U.S. 466 (2004) 25

Reid v. Covert, 354 U.S. 1 (1957) 11, 14, 17

TABLE OF AUTHORITIES – Continued

Page

United States v. Lindh, 227 F. Supp. 2d 565 (E.D. Va. 2002) 25

United States v. Tiede, 86 F.R.D. 227 (U.S. Ct. Berlin 1979) 14

In re Yamashita, 327 U.S. 1 (1946) 9, 13, 22, 23, 24

CONSTITUTION AND STATUTES

10 U.S.C. § 821 ..... 8, 10

10 U.S.C. § 836 10

10 U.S.C. § 904 18

10 U.S.C. § 906 18

10 U.S.C. § 3037 18

Act of Aug. 29, 1916, ch. 418, 39 Stat. 619 8

Act of July 17, 1862, ch. 201, 12 Stat. 597 ..... 7, 20

Act of June 4, 1920, ch. 227, 41 Stat. 759 ..... 8 20

Act of Mar. 2, 1867, ch. 153, 14 Stat. 428 8

Act of May 5, 1950, ch. 169, 64 Stat. 107 ..... 18, 24

Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) 10

S. Rep. No. 64-130 (1916) 9, 20

U.S. Const. art. I, § 8, cl. 10 4

U.S. Const. art. I, § 8, cl. 11 4

U.S. Const. art. I, § 8, cl. 14 4

U.S. Const. art. II, § 2, cl. 1 4

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

A Compilation of the Messages and Papers of the Presidents (J. Richardson ed. 1925) 6

American Articles of *War of 1775* 4, 19

American State Papers: Military Affairs (1819) 6

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Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) 1, 11, 12, 18, 25

Executive Order 9511, Fed. Reg. 549 (Jan. 16, 1945) 22

Francis Biddle, *In Brief Authority* (1962) 15

Frederick Bernays Wiener, *A Practical Manual of Martial Law* (1940) 20

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TABLE OF AUTHORITIES – Continued

Page

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Kathleen T. Rhem, "Officials Announce Changes to Military Commissions Procedures," *at* http://www.defenselink.mil/news/Aug2005/20050831_2583.html 3

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Military Order of July 2, 1942, 7 Fed. Reg. 5103 (July 2, 1942) 14, 15, 21

Proclamation No. 2561, 7 Fed. Reg. 5101 (July 7, 1942) 26

TABLE OF AUTHORITIES – Continued

Page

R.R. Baxter, "The First Modern Codification of the Law of War: Francis Lieber: and General Orders No. 100," 3 *Int'l Rev. Red Cross* 171 (No. 25, Apr. 1963) 8

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Steven B. Ives, Jr., "Vengeance Did Not Deliver Justice," *Washington Post*, Dec. 30, 2001 23

The Declaration of Independence (U.S. 1776) 3

The Diary of Edward Bates, 1859-1866 (H. Beale ed. 1933) 13

The Federalist (C. Rossiter ed. 1961) 3, 4

The Records of the Federal Convention of 1787 (M. Farrand ed. 1937) 4

The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies (1894) 7, 19

William Blackstone, *Commentaries* 25

William Winthrop, *Military Law and Precedents* (2d ed. 1920) 6, 8

Winfield Scott, *Memoirs of Lieut.-General Scott, L.L.D.* (1864) 7, 26

Writings of George Washington (J. Fitzpatrick ed. 1931) 5

REGULATIONS

32 C.F.R. § 9.4(a)(4) 15

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Louis Fisher is Senior Specialist in Separation of Powers with the Congressional Research Service of the Library of Congress, where he has worked since 1970.[2] He is the author of numerous books and articles on constitutional law and is frequently invited to testify before Congress. Dr. Fisher has conducted extensive research on military commissions and written two books on the subject: *Nazi Saboteurs on Trial: A Military Tribunal and American Law* (2003); and *Military Tribunals and Presidential Power: American Revolution to the War on Terrorism* (2005). Based upon this expertise, he has an interest in providing the Court with a fuller understanding of the history of military commissions and their relationship to presidential power, the separation of powers and other issues in this case.

PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

In November 2001, President Bush established military commissions to try individuals in the "war on terrorism." *See* "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed.

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[1] *Amicus curiae* certifies that all parties have consented to the filing of this brief. Pursuant to Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and that no person or entity other than *amicus* and his counsel has contributed monetarily to the preparation or submission of this brief.

[2] The views expressed in this brief are Dr. Fisher's own, and his institutional affiliations with the Library of Congress and Congressional Research Service are provided for identification purposes only.

Reg. 57,833 (Nov. 13, 2001) ("Military Order"). In the court of appeals, the government argued that military commissions "have tried enemy combatants since the earliest days of the Republic under such procedures as the President has deemed fit." Brief for Appellants in U.S. Court of Appeals for the District of Columbia Circuit at 53. The court of appeals ignored the actual historical practice of military commissions and their limitations, instead concluding that "there is little to [petitioner's] argument" that the commissions violate the separation of powers. *Hamdan v. Rumsfeld*, 415 F.3d 33, 37 (D.C. Cir. 2005). That conclusion is fundamentally flawed, as history simply does not support the government's argument that the President has broad inherent authority to establish military commissions. First, the separation of powers has traditionally limited the President's authority to establish military commissions without congressional authorization. Military commissions have long been understood as an emergency measure to be used by a commander in the field to fill a temporary gap created by the absence of civilian court or court-martial jurisdiction. Second, historical practice illustrates that military commissions have typically occurred in a zone of combat operations or occupied territory, have generally sought to adhere to the procedures used in courts-martial, and have never singled out a broad class of non-citizens. Military commissions that have exceeded these parameters have left a stain upon the American system of justice.

Moreover, the eleventh hour changes made to the rules governing the military commissions, issued days before the government's opposition brief was due in this case, do not rectify central flaws of the commissions, including their failure to provide for review by the Judge

Advocate General ("JAG"), as required under the Uniform Code of Military Justice. *See* Kathleen T. Rhem, "Officials Announce Changes to Military Commissions Procedures," *at* http://www.defenselink.mil/news/Aug2005/20050831_2583.html. That failure is particularly striking since members of the Court and scholars later criticized the commissions used in *Ex parte Quirin*, 317 U.S. 1 (1942), precisely because they excluded JAG review. Moreover, the use of a single judge rather than a mixed panel to rule on questions of law now takes these commissions out of any known historical precedent whatsoever, including *Quirin*. If the history of military commissions teaches us anything, it is that the President cannot simply make up the rules of military justice as he goes along. The Court should not allow it to happen here.

ARGUMENT

I. The Separation Of Powers Has Historically Limited The Executive's Authority To Establish Military Commissions.

The American constitutional system is founded on the principle of the separation of powers. *See, e.g.*, *The Federalist* No. 47, at 301 (James Madison) (C. Rossiter ed. 1961) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."). Indeed, it was the military abuses by the King of England that drove colonial leaders in America to seek their independence and to limit the concentration of military power in their new republic. *The Declaration of Independence* para. 14 (U.S. 1776) ("[The king] has affected to "render the Military independent of and superior to the Civil power.").

The Constitution seeks to ensure the separation of powers by providing Congress with broad authority to regulate armed conflict. *See, e.g.*, U.S. Const. art. I, § 8, cl. 11 (power "[t]o declare War . . . and make Rules concerning Captures on Land and Water"); *id.* art. I, § 8, cl. 10 (power "[t]o define and punish . . . Offences against the Law of Nations"); *id.* art. I, § 8, cl. 14 (power "[t]o make Rules for the Government and Regulation of the land and naval Forces"). While the Constitution also makes the President "Commander in Chief of the Army and Navy," *id.* art. II, § 2, cl. 1, this power has always been a limited one. *See, e.g.*, *The Federalist* No. 69, at 418 (Alexander Hamilton) (C. Rossiter ed. 1961) (commander-in-chief power meant "nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy"); 2 *The Records of the Federal Convention of 1787*, at 318 (M. Farrand ed. 1937) (power Framers left solely in hands of President was power "to repel sudden attacks"). The government's argument in this case fundamentally challenges those limits.

The separation of powers limits the Executive's authority to establish military commissions to try and punish offenses. Ever since the Articles of War were enacted 230 years ago, Congress has regulated military justice, and it has never been thought an infringement on executive prerogatives to control how military courts try individuals in times of war. In 1775, the Continental Congress adopted rules and regulations for the military in a series of 69 Articles of War. *American Articles of War of 1775*, *reprinted in* William Winthrop, *Military Law and Precedents* 953-60 (2d ed. 1920). It thus established standards *in advance* by which to address offenses like mutiny and sedition, and required that such offenses be

judged and punished by courts-martial, not left to the discretion and judgment of military commanders or executive officials. Louis Fisher, *Military Tribunals and Presidential Power* 7 (2005). As commander in chief during the American Revolution, George Washington operated on the basis of legislative authority, not free-standing or independent executive authority. He adhered to the Articles of War by reviewing death sentences imposed by courts-martial, 13 *Writings of George Washington* 136-40 (J. Fitzpatrick ed. 1931), which he sometimes overturned for lack of legal basis. 11 *Writings of George Washington*, *supra*, at 262. Washington recognized that changes in the military code "can only be defined and fixed by Congress." 17 *Writings of George Washington*, *supra*, at 239. Similarly, during the War of 1812, President Madison did not make urgently needed changes to court-martial procedure on his own but, rather, sought and obtained those revisions from Congress in advance. *See* Fisher, *Military Tribunals*, *supra*, at 23.

The government's reliance on the military trial of Arbuthnot and Ambrister during the Seminole War in Florida in 1818, is equally unpersuasive. Brief for Appellants in U.S. Court of Appeals for the District of Columbia Circuit at 59. Moreover, that reliance actually underscores the abuses to which military commissions are prone and the need for Congress to maintain oversight and control. After the tribunal changed its sentence against Ambrister from death to corporal punishment, General Andrew Jackson overrode its decision and directed that Ambrister be shot. Jackson's order was carried out. President Monroe did not defend Jackson or attempt to justify his action on the basis of executive authority. Instead, he distanced himself from Jackson's decision and forwarded documents

about the case when Congress requested them for legislative investigation. President Monroe thus recognized that the branch ultimately in control of military commissions was the legislature, not the executive. 2 *A Compilation of the Messages and Papers of the Presidents* 612 (J. Richardson ed. 1925); *see also* 15 *Annals of Congress* 2136-50 (1818). The following year, the House Committee on Military Affairs issued a critical report of the trials. It found that no law authorized the men to be tried before a military court for the alleged offenses, except the charge that Arbuthnot was "acting as a spy," of which he was found not guilty, and concluded that there was not even "a shadow of necessity for [their] death." 1 *American State Papers: Military Affairs* 735 (1819). The Committee, moreover, found it "remarkable" that Jackson would seek to justify the tribunals on the ground that the men were pirates or outlaws since the former applies only to "offences upon the high seas" and the latter "applies only to the relations of individuals with their own Governments." *Id.* A Senate report likewise rejected the theory that Arbuthnot and Ambrister were "outlaws and pirates" and further noted that "[h]umanity shudders at the idea of a cold-blooded execution of prisoners, disarmed, and in the power of the conqueror." 15 *Annals of Congress* 267 (1819) (internal quotation marks omitted). The prominent military jurist William Winthrop later remarked that if an officer had ordered the execution as Jackson had, he "would now be indictable for murder." William Winthrop, *Military Law and Precedents*, at 465 (2d ed. 1920) (emphasis omitted).

The first actual military commissions were established by General Winfield Scott in 1847 during the Mexican War as an emergency measure to address undisciplined action and other misconduct by American troops.

See 2 Winfield Scott, *Memoirs of Lieut.-General Scott, L.L.D.* 392-93 (1864). General Scott never questioned Congress's authority to control the commissions. To the contrary, he sought statutory authority beforehand and explained that he was merely filling a gap by instilling discipline among his troops and combating guerrilla warfare until Congress could enact legislation necessary to accomplish those ends. *Id.* at 393. Indeed, Scott relied heavily upon the Articles of War and existing practice in the States, and further provided that no commission "shall try any case clearly cognizable by any court martial." *Id.* at 544.

During the Civil War, military commissions were initially established to address "'crimes and military offenses . . . not triable or punishable by courts-martial and . . . not within the jurisdiction of any existing civil court.'" 2:1 *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies* 247 (1894) (quoting army general order dated January 1, 1862).[3] These commissions were clearly grounded in statutes which recognized their existence and operation as early as 1862. *See, e.g.*, Act of July 17, 1862, ch. 201, § 5, 12 Stat. 597, 598 ("[T]he President shall appoint . . . a judge advocate general . . . to whose office shall be returned, for revision, the records and proceedings of all courts-martial and military commissions, and where a record shall be kept of all proceedings had thereupon."). Francis Lieber noted that the comprehensive code he developed to enable commanders in the field to wage war effectively and humanely was issued as an army general

[3] "2:1" stands for series 2, volume 1.

order because the word "code" indicated something that the President "has no right to issue – something which requires the assistance of Congress – an enactment." R.R. Baxter, "The First Modern Codification of the Law of War: Francis Lieber: and General Orders No. 100," 3 *Int'l Rev. Red Cross* 171, 185 (No. 25, Apr. 1963).

The Supreme Court curtailed the use of military commissions shortly after the Civil War ended. *Ex parte Milligan*, 71 U.S. 2 (1866). Although the Court decided *Milligan* on other constitutional grounds, *id.* at 127 (forbidding use of military commissions for civilians except when courts are closed), Chief Justice Chase reaffirmed the traditional understanding that military jurisdiction must be expressly authorized by Congress. *See id.* at 139-40 (Chase, C.J., concurring); *see also* Winthrop, *supra*, at 836 (absent express statutory authorization, jurisdiction of military commission limited to offenses committed "within the field of the command of the convening commander" and within "the theater of war or a place where military government or martial law may legally be exercised"). When military commissions were next used to suppress insurrection and violence in the South during the post-war military occupation, they were expressly provided for by statute. *See* Act of Mar. 2, 1867, ch. 153, § 3, 14 Stat. 428.

Congress amended the Articles of War in 1916, and again in 1920. Article 15 (now 10 U.S.C. § 821) provided that other provisions conferring court-martial jurisdiction did not deprive military commissions of concurrent jurisdiction over offenses or offenders that may be triable by such commissions. *See* Act of June 4, 1920, ch. 227, 41 Stat. 759, 790; Act of Aug. 29, 1916, ch. 418, 39 Stat. 619, 653. As noted military attorney and historian Frederick

Bernays Wiener explained, Article 15 was intended as a *restriction* on military commissions, which had improperly asserted jurisdiction over courts-martial during the Civil War. Louis Fisher, *Nazi Saboteurs on Trial: A Military Tribunal and American Law* 130 (2003). At most, this provision "just save[d]" to military commissions the jurisdiction traditionally exercised by "the military commander *in the field* in time of war." S. Rep. No. 64-130, at 40 (1916) (testimony of Judge Advocate General Enoch H. Crowder) (emphasis added). Indeed, the next attempt to establish military trials was through the introduction of new legislation, which President Woodrow Wilson successfully opposed. Fisher, *Military Tribunals*, *supra*, at 86-87 (defeat of proposed bill to establish military jurisdiction over sedition cases).

In *Ex parte Quirin*, 317 U.S. 1 (1942), the Court relied on Article 15 in holding that eight German saboteurs could be tried by military commission for violations of the law of war, *id.* at 28, but declined to decide whether the President had the constitutional authority to create such commissions without congressional legislation, *id.* at 29. The *Quirin* Court emphasized the close relationship between the actions of the German saboteurs (who had buried their uniforms) and spying, an offense defined by statute since the American Revolution, *id.* at 31 & n.9, 41, limiting its decision "only" to the "particular acts" of the saboteurs and "the conceded facts." *Id.* at 46. Moreover, *Quirin*, as Justice Scalia observed, "was not th[e] Court's finest hour," *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633, 2669 (2004) (Scalia, J., dissenting), and it, like *In re Yamashita*, 327 U.S. 1 (1946), has been eroded by subsequent criticism and developments. *See infra* at 10-13, 15-18.

The court of appeals here ignored the limitations that separation of powers principles have long imposed on the President's authority to establish military commissions. Instead, it relied on the Authorization for the Use of Military Force, Pub. L. No., 107-40, 115 Stat. 224 (Sept. 18, 2001), which permits the use of "all necessary and appropriate force," but which is silent on the question of military commissions. Expanding presidential power through the creation of military commissions must be addressed expressly and concretely by Congress. Here, it was not; but altering the scope of presidential power in such a manner cannot be implied or inferred.

The court of appeals also relied on the provisions of the Uniform Code of Military Justice contained at 10 U.S.C. §§ 821, 836, but failed to acknowledge the limitations on the jurisdiction of military commissions that Congress imposed under that statute. *Hamdan*, 415 F.3d at 37-38. Section 821 and 836 only recognize that military commissions exist as a general category of military court. They do not, and cannot, authorize any and every version of a military commission that a President may wish to create. That is because, fundamentally, Congress cannot transfer to the President and his aides total discretion over the operation of military commissions, for that would surrender an authority that is placed fundamentally in the legislative branch. There are no grounds to argue that Congress, by enacting Section 821 and 836, so abdicated its constitutional power and changed the nature of representative government.

The authority to establish military commissions has traditionally resided with Congress, not the President. To the extent the President may establish military commissions without express congressional authorization, it is

narrow (as in the case of General Scott during the Mexican War), he may only fill in jurisdictional gaps until Congress acts. History does not support the Bush Administration's establishment of military commissions to try a broad range of offenses under the rubric of the "law of war," offenses that may already be prosecuted under existing federal statutes. *See* "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," § 2(a), 66 Fed. Reg. 57,833, 57,834, (Nov. 13, 2001) ("Military Order"). It likewise does not support the Administration's creation of new procedures for military trials where Congress has already set forth such procedures in the Uniform Code of Military Justice ("UCMJ"). To the contrary, the current commissions represent precisely the "blending of functions in one branch of the Government . . . which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers." *Reid v. Covert*, 354 U.S. 1, 39 (1957) (plurality opinion).

II. The Current Military Commissions Are Completely Without Precedent.

The current military commissions clash with historical practice and separation of powers principles in virtually every important respect. First, military commissions have traditionally been limited to a zone of combat operations or occupied territory, and have been used in conflicts against a well-defined enemy. Second, military commissions have commonly adhered to the procedures established by Congress and used in courts-martial. Third, military commissions have never singled out a broad class of non-citizens for trial.

The military commissions at issue here establish a novel system of military justice, far from any battlefield, in an amorphous "war on terrorism," without a defined enemy or end. Further, these commissions can try a potentially limitless class of millions of non-citizens for a broad range of offenses which may already be prosecuted under existing federal statutes, Military Order, *supra*, § 2(a), and employ a new set of procedures even though Congress has already set forth procedures for military trials in the UCMJ. Such a radical departure from historical precedent and separation of powers principles should not be permitted without a definitive statement from this Court. *See Quirin*, 317 U.S. at 19 (reviewing validity of commissions to try alleged Nazi saboteurs in Special Term in middle of war "[i]n view of the public importance of the questions raised by their petitions and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty").

A. Military Commissions Have Traditionally Been Confined to a Zone of Combat Operations or Occupied Territory.

Military commissions have typically been confined to a zone of combat operations or occupied territory. The military commissions used during the Mexican War took place in occupied territory and enabled the commander there to establish order over both U.S. troops and Mexicans. Similarly, most military commissions during the Civil War occurred in Union-occupied Confederate territory and "strife-torn border states." Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* 168-69 (1991). As they became more widespread, serious

abuses resulted. For example, Captain Henry Wirz, the superintendent of the notorious Andersonville prison, was unfairly blamed by a military commission for the conditions there and was "hurried to his death by vindictive politicians, an unbridled press, and a nation thirsty for revenge." Darrett B. Rutman, "The War Crimes and Trial of Henry Wirz," 6 *Civil War Hist.* 117, 118 (1960). The military commission hastily set up to try alleged conspirators in Lincoln's assassination was, in the words of Lincoln's former Attorney General, "not only unlawful, but . . . a gross blunder in policy . . . [which] denies the great, fundamental principle that ours is a government of *Law*." *The Diary of Edward Bates, 1859-1866*, at 483 (H. Beale ed. 1933) (emphasis in original).

Most military commissions conducted during World War II also occurred in a theater of war or in occupied territory, and not at a peaceful military base like Guantánamo Bay. *Yamashita*, 327 U.S. at 5 (military commission in recently re-conquered Philippine Islands to try Japanese general);[4] *Johnson v. Eisentrager*, 339 U.S. 763, 765-66 (1950) (military commission in Nanking, China, to try individuals in service of German armed forces). Also, those commissions occurred in a declared war against a fixed and well-defined enemy, not an amorphous "war against terrorism" without a defined enemy or end.

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[4] The court of appeals minimized the differences between the commission in *Yamashita* and the commissions at Guantánamo, noting that the former occurred "after Japan had surrendered." *Hamdan*, 415 F.3d at 38. Yet, there is a great difference between military commissions conducted by a field commander in recently re-conquered territory in the aftermath of hostilities and those conducted by presidential order thousands of miles from any battlefield almost four years after the defendant's capture, as in Hamdan's military trial at Guantánamo.

In *Madsen v. Kinsella*, 343 U.S. 341 (1952), the Court held that a military occupation court had jurisdiction to try a U.S. serviceman's wife for murder in occupied Germany. *Id.* at 342-43; *see also United States v. Tiede*, 86 F.R.D. 227, 256-57 (U.S. Ct. Berlin 1979) (U.S. and Germany technically at war when Madsen was tried; distinguishing military trials by occupation courts during belligerency). *Madsen*, however, did not apply the UCMJ at all, and has been eroded by later decisions curtailing military jurisdiction over non-military personnel outside the United States. *See, e.g., Reid v. Covert*, 354 U.S. 1 (1957) (civilian dependant of armed service member not subject to court-martial in capital case); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960) (civilian dependent of armed service member not subject to court-martial in non-capital case); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960) (civilian employees of overseas military forces not subject to court-martial in non-capital cases).

Ex parte Quirin simply does not support the President's unilateral creation of a brand new military justice system of unprecedented scope and sweep. *Quirin* occurred during a dark period in World War II, only six months after Pearl Harbor and amid a major U-boat offensive by Nazi Germany off the U.S. coast. David Glazier, Notes, "Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission," 89 *Va. L. Rev.* 2005, 2053 (2003). Nonetheless, President Franklin D. Roosevelt did not create a military commission with jurisdiction over millions of possible subjects. Rather, his Military Order of July 2, 1942 specifically named the eight captured Germans to be tried in civil court. Fisher, *Nazi Saboteurs*, *supra*, at 45-46. The Roosevelt Administration, however,

feared that a public trial of the saboteurs in civilian court would reveal that they had been captured not because of "uncanny FBI organizational skills" but, rather, because one of the saboteurs had turned himself in and identified the others. *Id.* at 46. It also worried that a public trial would broadcast how easily German U-boats had reached American shores undetected and thereby encourage future attempts. *Id.* For this reason, jurisdiction was shifted from the civil courts to the military tribunal. Moreover, the Roosevelt Administration also believed that the potential sentences under criminal law were insufficient, possibly only a maximum of two or three years in prison. Francis Biddle, *In Brief Authority* 328 (1962). The Administration concluded that, by contrast, a military tribunal could act quickly and impose the death penalty. Fisher, *Nazi Saboteurs*, *supra*, at 50. In establishing the commission, Roosevelt sought to vest final reviewing authority in himself. Military Order of July 2, 1942, 7 Fed. Reg. 5103 (July 2, 1942). He warned Attorney General Francis Biddle, who shared prosecution duties with the Judge Advocate General of the Army, that he would not "hand [the defendants] over to any United States marshal armed with a writ of habeas corpus." Biddle, *supra*, at 331.

The Supreme Court agreed to hear the case of the saboteurs on July 23, 1942, and publicly announced on July 27 that oral argument would begin on July 29, before there had been any action by lower courts. Lewis Wood, "Supreme Court Is Called in Unprecedented Session to Hear Plea of Nazi Spies," *New York Times*, July 28, 1942, at 1. At 8 p.m. on July 28, a federal district court dismissed a motion by defense counsel for a writ of habeas corpus. *Ex parte Quirin*, 47 F. Supp. 431 (D.D.C. 1942). At noon the next day, the Supreme Court began to hear the

case. The briefs filed by opposing parties are dated the same day oral argument commenced. 39 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 395, 463, 495 (1975). As a result, the Justices were unprepared to analyze complex issues of military law and Articles of War that are rarely placed before the Court.

On July 31, after two days of oral argument, the Court issued a one-page *per curiam* order, dismissing the habeas petitions and upholding the military commission's jurisdiction. *Ex Parte Quirin*, 63 S. Ct. 1 (1942). The Court did not issue its full opinion until nearly three months later, on October 29. By then, six of the eight saboteurs had already been executed (the remaining two had also been found guilty, but were given prison sentences by Roosevelt). Chief Justice Stone described writing the opinion as "a mortification of the flesh," and found only "meager" authority to support the commission's constitutionality. David J. Danelski, "The Saboteurs' Case," 1 *J. Sup. Ct. Hist.* 61, 72-73 (1996) (internal quotation marks and citation omitted). Stone's purpose "was not to elucidate the law but, rather, to justify as best he could a dubious decision" after the fact. Michal R. Belknap, "The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case," 89 *Mil. L. Rev.* 59, 87 (1980). He and other Justices sought to do everything possible to secure a unanimous opinion. When it appeared the Court might fragment with separate statements, Justice Frankfurter circulated an impassioned plea, entitled "F.F.'s Soliloquy," in which he called the saboteurs "damned scoundrels" and cautioned his colleagues that "we [have] enough of a job trying to lick the Japs and the Nazis" without the Supreme Court "stirring up a nice row" with "abstract constitutional

discussions." Fisher, *Nazi Saboteurs*, *supra*, at 119-21. Yet, Justice Frankfurter later acknowledged that *Quirin* "was not a happy precedent," and Justice Douglas observed that "it is extremely undesirable to announce a decision on the merits without an order accompanying it . . . [b]ecause once the search for the grounds . . . is made, sometimes those grounds crumble." Danelski, *supra*, at 80 (internal quotation marks and citation omitted).

When the Roosevelt Administration prosecuted individuals charged with assisting the saboteurs, it did so in the civilian courts. Fisher, *Nazi Saboteurs*, *supra*, at 80-84; *see also Haupt v. United States*, 330 U.S. 631 (1947) (affirming treason conviction of father of saboteur Herbert Haupt). Moreover, this Court has since sought to limit military jurisdiction over those who are not members of the U.S. armed forces. *See, e.g.*, *Reid v. Covert*, 354 U.S. 1, 33 (1957) (plurality op.) (rejecting extension of military jurisdiction over civilians outside "the extraordinary circumstances present in an area of actual fighting"); *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946) (declaration of "martial law" in Hawaiian Organic Act did not "authorize the supplanting of courts by military tribunals"). Thus, notwithstanding *Quirin*, historical practice by 2001 demonstrates that military commissions could not be established outside a theater of war or occupied territory, at least not without express congressional authorization.[5]

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[5] This Court's decision in *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633 (2004), is not to the contrary. First, *Hamdi* involved only the detention, and not military trial, of an "enemy combatant." 124 S. Ct. at 2639 (plurality op.); *see also id.* at 2674, 2682, 2677-85 (Thomas, J., dissenting) (repeatedly emphasizing that *Hamdi* involved detention,

(Continued on following page)

B. The Procedures Used in Military Commissions Have Historically Conformed to Those Used in Courts-Martial.

The Military Order and implementing regulations depart in numerous important ways from the procedures established by Congress for use in courts-martial. For example, they make the President, or the Secretary of Defense acting at his discretion, tne final reviewing authority, and thus dispense with the multi-tiered review process under the UCMJ, including an appeal to the United States Court of Appeals for the Armed Forces. *See Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 166 & n.12 (D.D.C. 2004) (listing numerous differences between current military commissions and courts-martial). The Military Order also dispenses with the requirement that the Judge Advocate General "receive, revise, and have recorded the proceedings of . . . military commissions.' 10 U.S.C. § 3037. Moreover, the implementing order designates a judge advocate of the U.S. armed forces to serve as a voting member of the trial panel, 32 C.F.R. § 9.4(a)(4), a practice Congress abandoned when it enacted the UCMJ. Act of May 5, 1950, ch. 169, § 13, 64 Stat. 107, 117, 121 (limiting role of judge advocate members to ruling on questions of law that arise during trial).

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and distinguishing punishment from detention). Second, the plurality relied on *Quirin* for the proposition that "the capture, detention, and trial of unlawful combatants, 'by universal agreement and practice,' are 'important incident[s] of war.'" *Id.* at 2640 (quoting *Quirin*, 317 U.S. at 28). It never addressed what body would try unlawful combatants. Congress, however, has expressly provided that individuals like Hamdan may be tried by a military commission only for aiding the enemy, 10 U.S.C. § 904, and/or spying. *Id.* § 906.

The government argues that military commissions "have tried enemy combatants since the earliest days of the Republic under such procedures as the President has deemed fit." Brief for Appellants in U.S. Court of Appeals for the District of Columbia Circuit at 53. That argument is wrong.[6] Military commissions during the Mexican War applied the same procedures, granted the same rights to the accused, utilized the same rules of evidence, and accorded the same post-trial review as did courts-martial. Glazier, *supra*, at 2030-31.[7] The Civil War likewise saw an effort to conform procedures used in military commissions to those used in courts-martial. *See, e.g.*, Gen. Order No. 1, HQ, Dept. of the Missouri, Jan. 1, 1862 ("[M]ilitary commissions . . . should be ordered by the same authority, be constituted in a similar manner and their proceedings be conducted according to the same general rules as courts-martial in order to prevent abuses which might otherwise arise."), *reprinted in The War of the Rebellion*, *supra*, at

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[6] As discussed above, the government mistakenly relies on the trials of John André in 1780 and Alexander Arbuthnot and Robert Christy Ambrister in 1818. *Id.* at 57-59. With respect to André, the Continental Congress had previously adopted a resolution in 1776 expressly providing that enemy spies "shall suffer death . . . by sentence of a court martial, or such other punishment as such court martial shall direct," 5 *Journals of the Continental Congress, 1774-1789*, at 693, and had ordered that this resolution "be printed at the end of the rules and articles of war." *Id.* Even before that, Congress had made it punishable by court-martial for members of the continental army to "hold[] correspondence with, or . . . giv[e] intelligence to, the enemy." *American Articles of War of 1775*, *reprinted in* Winthrop, *supra*, at 955 (Article 28). As explained earlier, the military trial of Arbuthnot and Ambrister has been discredited. *See supra* at 4-5.

[7] The one exception, the "Councils of War," which tried individuals for offenses related directly to the war, was a brief experiment which was discontinued during the Civil War in favor of the single military commission. Glazier, *supra*, at 2033.

248; *see also* Act of July 17, 1862, *supra*, 12 Stat. at 598 (same post-conviction review in military commissions and courts-martial).

Testifying before Congress regarding proposed revisions to the Articles of War in 1916, the legislation's author explained that military commissions and courts-martial "have the same procedure." S. Rep. No. 64-130, at 40 (testimony of Judge Advocate General Enoch H. Crowder). Military commissions established in occupied territories in Rhineland after World War I employed substantially the same procedures as courts-martial. Glazier, *supra*, at 2048. Moreover, the 1929 Geneva Convention on the Treatment of Prisoners of War provided that the "[s]entence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power." Geneva Convention Relative to Treatment of Prisoners of War, art. 63, July 27, 1929, 47 Stat. 2021, 2052. Thus, on the eve of World War II, it was widely accepted that "even in the absence of statute . . . the general court-martial is a proper guide for the constitution, commission, and procedure of military commissions." Frederick Bernays Wiener, *A Practical Manual of Martial Law* 123 (1940).

In *Quirin*, however, the Roosevelt Administration unjustifiably departed from court-martial practice under the Articles of War in establishing a military commission to try the eight German saboteurs in 1942. Article 43 mandated a unanimous vote to impose a death sentence, 41 Stat. at 795-96, and Articles 46 and 50½ required review of such sentences by a board of review consisting of at least three officers from the Army Judge Advocate General's office and the Judge Advocate General. 41 Stat.

at 796-97. Roosevelt's commission, however, allowed for conviction and sentence in a capital case by two-thirds vote and failed to provide for judge advocate review. 7 Fed. Reg. 5103, *supra*. This review has historically played an important role in correcting substantive errors and assuring the integrity of military proceedings. *See, e.g.*, *Ex parte Mason*, 256 F. 384, 387 (C.C.N.D.N.Y. 1882); Fisher, *Military Tribunals*, *supra*, at 124. During the Civil War, for example, President Lincoln's Judge Advocate General, Joseph Holt, frequently overturned convictions by military commissions and courts-martial, including in cases where the accused was denied the right to be present and confront an adverse witness. Neely, *supra*, at 162-63; *see also* Fisher, *Military Tribunals*, *supra*, at 49-50 (Lincoln, with the assistance of the office of adjutant general, reviewed and often reversed convictions by military tribunals).

The government's failure to adhere to Articles 46 and 50½ troubled the *Quirin* Court, and the Court avoided the issue merely by establishing a military commission and adopting whatever procedures the Administration wanted. *Quirin*, 317 U.S. at 47-48. Justice Frankfurter later asked Frederick Bernays Wiener, his former student and an acknowledged expert on military law, for his evaluation of the Court's work. Wiener told him that the "[w]eakness in the [Court's] decision flowed 'in large measure' from the [Roosevelt] Administration's disregard for 'almost every precedent in the books' when it established the military tribunal." Fisher, *Nazi Saboteurs*, *supra*, at 129 (quoting Wiener's papers). Wiener emphasized that court-martial procedures had "almost uniformly been applied to military commissions," and that it was "too plain for argument" that the President could not unilaterally waive or override the required review by the Judge Advocate General's office

simply by establishing a military commission. *Id.* at 130, 132. Wiener also said that the only precedent for using the Judge Advocate General of the Army as prosecutor – the trial of the Lincoln conspirators – was one which "no self-respecting military lawyer will look straight in the eye." *Id.* at 131. Unless authorized by statute, Wiener said, the President could not avoid the rules customarily used in courts-martial merely by establishing a military commission. *Id.* at 132.

When two other German agents were captured after entering the United States some two years later, Secretary of War Henry Stimson cautioned Roosevelt that replicating the procedures used for the *Quirin* saboteurs would lead to charges in Germany that "innocent Germans were being tried and condemned by an extraordinary proceeding" and would "likely . . . lead to German maltreatment of American prisoners of war in their hands." Fisher, *Nazi Saboteurs*, *supra*, at 140 (internal quotation marks and citation omitted). This time, President Roosevelt conformed the military commission more closely to courts-martial, including by restoring judge advocate review under the Articles of War. Executive Order 9511, 10 Fed. Reg. 549, § 2(d) (Jan. 16, 1945) ("The record of the trial, including any judgment or sentence, shall be promptly reviewed [by the Judge Advocate General's office] under the procedures established in Article 50½ of the Articles of War."). Thus, the 1942 tribunal upheld in *Quirin* was repudiated less than three years later by the Roosevelt Administration.

In *Yamashita*, the Court stated that the Articles of War then in effect did not require military commissions to follow court-martial procedures. 327 U.S. at 18-20. *But see id.* at 70 (Rutledge, J., dissenting) (Congress intended to

"lay down identical provisions" for military commissions and courts-martial). However, the legal basis for *Yamashita* has been eroded by subsequent statutory changes to military jurisdiction. *See Hamdan*, 344 F. Supp. 2d at 169-70 (explaining how revisions to Articles of War support application of court-martial procedures to military commissions).

Yamashita is also a dubious precedent for other reasons. The commission there consisted of five American generals hastily sent from Washington to try Yamashita for violations committed by Japanese troops purportedly under his command. Although they were required to rule on complex legal issues, none of the generals had any legal expertise or any significant combat experience. Steven B. Ives, Jr., "Vengeance Did Not Deliver Justice," *Washington Post*, Dec. 30, 2001, at B2. The army officers appointed to defend Yamashita had only three weeks to prepare for trial. Richard L. Lael, *The Yamashita Precedent: War Crimes and Command Responsibility* 81 (1982). Fifty-nine of the 123 charges were filed the same day trial began, but no continuance was granted to the defense. *Yamashita*, 327 U.S. at 33 (Murphy, J., dissenting). None of the charges established a direct link between Yamashita and the underlying criminal acts. Lael, *supra*, at 80-81. Indeed, many of the troops that had committed the atrocities were not even under Yamashita's command, let alone control, at the time, and Yamashita's name was rarely mentioned at trial. Ives, *supra*, at B2. Justices Murphy and Rutledge separately expressed outrage at the proceedings. *Yamashita*, 327 U.S. at 27-28 (Murphy, J., dissenting) ("[Yamashita] was rushed to trial under an improper charge, given insufficient time to prepare an adequate defense, deprived of the benefits of some of the most elementary rules of

evidence and summarily sentenced to be hanged."); *id.* at 61 (Rutledge, J., dissenting) (proceeding violated fundamental rights and lacked "any semblance of trial as we know that institution"). Far from supporting the government's position, *Yamashita* thus demonstrates the egregious violations that can result when military commissions are inappropriately deemed "wholly free" from the restraints that govern courts-martial as well as civilian courts, *id.* at 70 (Rutledge, J., dissenting), and thus highlights the error of the decision of the courts of appeals.

Moreover, the system of military justice has evolved significantly since the enactment of the UCMJ in 1950. *See, e.g.*, Brigadier General John S. Cooke, "The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X," 156 *Mil. L. Rev.* 1, 8 (1998) ("[E]nacting the UCMJ was the beginning of an effort to erect a true judicial system within the body of the military organization."); Kevin J. Barry, "Military Commissions: Trying American Justice," *2003-NOV Army Law.* 1, 3 (2003) ("Underlying [UCMJ's enactment] was the adoption of the . . . precept that military effectiveness depends on justice and that, by and large, civilian forms and principles are necessary to ensure justice in military trials.") (internal quotation marks and citation omitted). In addition to conforming courts-martial procedures to contemporary notions of due process, *e.g.*, Barry, *supra*, at 3, Congress has added professionalism and expertise to the military justice system by, for example, requiring that the Judge Advocate General of each service be a member of a federal or state bar, with at least eight years' experience in legal duties as commissioned officers. Act of May 5, 1950, *supra*, 64 Stat. at 147.

President Bush's Military Order was issued without any assistance from the Judge Advocate General's office, let alone from Congress, and ignored these important developments in military justice. Fisher, *Military Tribunals*, *supra*, at xi. Career military attorneys have criticized the commissions' departure from these standards. *See, e.g.*, Jeanne Cummings, "Gonzales Rewrites Laws of War," *Wall Street Journal*, Nov. 22, 2002, at A4. Indeed, while court-martial procedures have evolved significantly, the current commissions recall the military law of a bygone day – a law, as Blackstone put it, "built upon no settled principles," "entirely arbitrary in its decisions," and "in truth and reality no law." 1 William Blackstone, *Commentaries* *413. They should not be allowed.

C. Military Commissions Have Never Before Singled Out a Broad Class of Non-Citizens.

Under the Military Order, only foreign nationals are subject to trial by military commission. Military Order, *supra*, § 2(a), 66 Fed. Reg. at 57,834. The Order encompasses not only non-citizens outside the United States, but also the estimated 18 million non-citizens in this country. So, while the President has asserted the authority to detain both citizens and non-citizens as "enemy combatants," *see Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004), only the former will necessarily receive the protections of the civil courts if prosecuted. *See United States v. Lindh*, 227 F. Supp. 2d 565, 566 n.2 (E.D. Va. 2002) (prosecution of U.S. citizen charged, *inter alia*, with providing and conspiring to provide material support to al Qaida). The use of military commissions to create this kind of dual and

distorted system of military justice is unconstitutional and without precedent.

Military commissions have never before expressly discriminated against such a broad and open-ended class of foreign nationals. Indeed, the first military commissions were established during the Mexican War to address undisciplined action by *American* troops, and sought to ensure that "all offenders, Americans and Mexicans, were alike punished" to avoid the backlash that discriminatory treatment engenders. Scott, *supra*, at 392-95. Commissions during the Civil War likewise were not limited exclusively to Confederates. Neely, *supra*, at 174. Even President Roosevelt's Order authorizing the military trial of the German saboteurs did not discriminate based upon citizenship status. Proclamation No. 2561, 7 Fed. Reg. 5101 (July 2, 1942) (subjecting to military tribunals "all *persons* who are subjects, citizens or residents of any nation at war with the United States") (emphasis added); *see also Quirin*, 317 U.S. at 37.

By singling out of millions of non-citizens in the United States for possible military trial, the current commissions again depart radically from historical precedent. Moreover, they dangerously concentrate power in the President since they burden only those who cannot vote, and thus lack "the powerful check of political accountability on Executive" action. *North Jersey Media Group v. Ashcroft*, 308 F.3d 198, 220 (3d Cir. 2002). *See generally Clinton v. City of New York*, 524 U.S. 417, 490 (1998) (Breyer, J., dissenting) ("The President . . . is an elected official. He is responsible to the voters. . . ."). For these reasons, too, the decision of the court of appeals cannot stand. Even in wartime – and especially in wartime – an independent judiciary must assure that the Presidential

power is kept within its proper bounds to preserve the system of self-government.

CONCLUSION

Until now, military commissions have been limited to a particular time, place, and well-defined enemy; they have been most vulnerable to abuse where they have exceeded defined boundaries. If the President is permitted to unilaterally create an entirely new system of military justice, lacking in statutory authority, bereft of important due process protections available in courts-martial and civilian courts, and applicable only to a broad class of non-citizens, it will mark another chapter in the troubled history of military commissions, one unsupported by the historical record, the law, or basic constitutional principles. The decision of the court of appeals should be reversed.

Respectfully submitted,

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